APV HILL & MILLS (M) SDN BHD

v.

AQ-PACIFIC WIDE SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
ABDUL KADIR SULAIMAN JCA
RICHARD MALANJUM JCA
ARIFIN ZAKARIA JCA
[CIVIL APPEAL NO. W-02-530-99]
14 JULY 2005

SHIPPING: *Carriage of goods - Bill of lading - Where bill of lading does not represent true state of affairs regarding shipment of goods*

SHIPPING: *Carriage of goods - Transhipment - Meaning of transhipment - Whether storage on land for a period negates transhipment*

CIVIL PROCEDURE: *Appeal - Fact, findings of - Findings of fact by trial judge - Whether so unreasonable that no reasonable tribunal would have come to that conclusion*

The defendant had a principal contract with a trade organization in Libya (called "JOWFE") to supply certain specified equipment manufactured in Malaysia. For the supply of the equipment to JOWFE, the defendant entered into a contract with the plaintiff for the manufacture and supply of the equipment C&F from Malaysia port to Benghazi port in Libya with specific condition of no transshipment of the equipment on its way from Malaysia to Libya. An LC was provided by Hong Kong Bank which stipulated the same condition as the LC given by JOWFE to the defendant prohibiting transhipment of the equipment from Malaysia to Libya. The shipment was to be from Shah Alam/Port Klang to Libya or the beneficiary's godown, which subsequently, however, was amended to allow shipment from Singapore but still with the prohibition of transhipment of the cargo to Libya.

Through the introduction of the defendant, the third party was appointed by the plaintiff to be the ship forwarder for the export of the equipment. It was agreed by the defendant and JOWFE, to the knowledge of the plaintiff, that a ship "Lady Jane" was to be used to transport the equipment. However, this ship would stop only in Singapore and not at Port Klang, Malaysia. So as to comply with the stipulation contained in the LC of no

A transhipment, the forwarder put up two proposals to the plaintiff *ie*, that the equipment could either be carried on land to Singapore or be loaded at Port Klang by any other ship for a straight journey to Benghazi. The plaintiff disagreed to both of the proposals put up by the third party forwarder. The forwarder then
B informed the plaintiff of the existence of a feeder vessel "Seng Leong" plying between Port Klang and Singapore to which the plaintiff agreed in order to transport the equipment from Malaysia to Libya. This was done without the knowledge of the defendant. However, the bill of lading upon which the plaintiff relied to draw
C down on the LC showed that the place of receipt and loading of the equipment was Port Klang on the ocean vessel "Lady Jane" and the port of discharge to be Benghazi. There was no mention made at all of Singapore port and the feeder vessel "Seng Leong" originating from Port Klang in the said bill of lading. The column
D for "precarriage by" was left blank. This created an impression that there was no transhipment of the equipment from Malaysia to Libya.

The equipment went on the feeder vessel "Seng Leong" from Port
E Klang to Singapore. In Singapore, it was kept at a godown there waiting to be taken over by the mother ship "Lady Jane". Problem arose with the authority in Singapore and the equipment was asked to be removed from there. The third party requested from the plaintiff instructions for the equipment to be brought back
F from Singapore to Port Klang. However, the plaintiff replied that it had no further interest in the equipment. In the end, the equipment never reached its destination, Benghazi. The plaintiff never got the benefit of the LC of the defendant in respect of the balance over the contract sum. Hence, the plaintiff commenced
G this suit against the defendant. As against the third party, the plaintiff sought indemnity.

The learned judge in the High Court dismissed the claim against both the defendant and the third party. The plaintiff appealed
H contending that the learned judge had erred in not making a finding of whether both the defendant and the plaintiff knew about the transhipment and acquiesced to the same and consequently whether the defendant was estopped from objecting to the same. It was also submitted that the defendant signed the
I certificate of origin and other documents bearing the port of loading or place of export as Singapore thereby giving an inference that transhipment was necessary, thereby imputing knowledge of

transhipment upon the defendant. It was further argued that the defendant received the bill of lading which clearly stated on its face that the port of loading was Port Klang and the defendant did not object to it but acted on it and submitted the bill of lading to JOWFE and got paid in full.

Held (dismissing the appeal with costs to both respondents) Per Abdul Kadir Sulaiman JCA:

[1] It is settled law that the Court of Appeal cannot be persuaded to come to its own conclusion on those facts found which is different from the conclusion reached by the court of first instance unless the conclusion reached by the court of first instance is so unreasonable that no reasonable tribunal would have come to that conclusion, which did not occur here. (para 17)

[2] The defendant must have known that the "Lady Jane" only called at Singapore whilst the equipment was at Shah Alam. To get the equipment down to Singapore to be loaded on to "Lady Jane" enroute to Benghazi, a way had to be found. But as far as the defendant was concerned in whatever way it was done, it must satisfy the letter of credit arrangement it had with JOWFE which prohibited transhipment and a similar provision contained in the LC in favour of the plaintiff. The plaintiff had preferred to use the feeder vessel "Seng Leong" to take the equipment at Port Klang and discharge it in Singapore to wait for "Lady Jane". The defendant was not informed of this arrangement. In the circumstances, the defendant cannot be clothed with the knowledge of the transhipment to stop it from objecting to the claim of the plaintiff. (para 19)

[3] The plaintiff chose to take the equipment from Port Klang by a feeder vessel "Seng Leong" which amounted to transhipment of the equipment. Transhipment means the transporting of cargo by means of a vessel to an export vessel which is to take the goods to its port of destination. By using the feeder vessel, in the circumstances of the case, the plaintiff went against the term of the LC by means of a transhipment of the equipment destined for Libya. (paras 19 & 21)

[4] Storage on land for a period does not necessarily alter a transhipment journey of goods. The element of transhipment is involved when the equipment was transported from Port Klang by a feeder vessel "Seng Leong" to Singapore to be loaded onto the ship "Lady Jane" to carry the equipment from there to the Port of Benghazi, Libya. (paras 22 & 23)

[5] The bill of lading which was sent to the defendant by the third party at the instruction of the plaintiff did not represent the true state of affairs. On the face of the document, there appears to be no transhipment of the equipment from Malaysia to Libya. But all the misdeeds cannot be attributed to the third party who merely carried out the instructions from the plaintiff. (para 26)

Bahasa Malaysia *translation of headnotes*

Defendan mempunyai suatu kontrak utama dengan sebuah organisasi perdagangan dari Libya (dipanggil "JOWFE") bagi membekal beberapa peralatan tertentu buatan Malaysia. Bagi membekalkan peralatatan tersebut kepada JOWFE, defendan memeterai kontrak dengan plaintif bagi membuat dan membekalkan peralatan berkenaan dari pelabuhan Malaysia ke pelabuhan Benghazi, Libya, tertakluk kepada syarat khusus bahawa tidak harus ada sebarang transhipment peralatan tersebut semasa dalam perjalanan dari Malaysia ke Libya. Surat Kredit ('SK') telah dikeluarkan oleh Hong Kong Bank yang menyatakan bahawa syarat yang sama seperti yang terdapat dalam SK telah diberi oleh JOWFE kepada defendan sekaligus melarang transhipment peralatan dalam perjalanan dari Malaysia ke Libya. Penghantaran adalah dari Shah Alam/Port Klang ke Libya atau ke gudang benefisiari. Ini kemudiannya dipinda bagi membenarkan penghantaran dari Singapura, tetapi masih tertakluk kepada syarat bahawa tidak harus ada transhipment kargo ke Libya.

Setelah diperkenalkan defendan, pihak ketiga telah dilantik oleh plaintif sebagai agen pengangkut ke kapal bagi mengeksport peralatan. Adalah dipersetujui oleh defendan dan JOWFE, dan diketahui oleh plaintif, bahawa sebuah kapal "Lady Jane" akan digunakan bagi mengeksport peralatan. Bagaimanapun, kapal ini hanya singgah di Singapura dan tidak di Port Klang, Malaysia. Maka, bagi mematuhi syarat yang terkandung di dalam SK, agen pengangkut mencadangkan dua penyelesaian kepada plaintif, iaitu,

sama ada peralatan dibawa ke Singapura melalui jalan darat atau menggunakan kapal lain di Port Klang untuk perjalanan terus ke Benghazi. Plaintif tidak bersetuju dengan kedua-dua cadangan pihak ketiga/agen pengangkut tersebut. Agen pengangkut kemudian memberitahu plaintif bahawa terdapat sebuah kapal penghubung (feeder vessel) "Seng Leong" yang belayar di antara Port Klang dan Singapura, yang mana ia dipersetujui oleh plaintif untuk digunakan bagi mengeksport peralatan dari Malaysia ke Libya. Ini dilakukan tanpa pengetahuan defendan. Bagaimanapun, bil lading, di atas mana plaintif bergantung untuk mempertunaikan SK, menunjukkan bahawa tempat penerimaan dan pemuatan adalah Port Klang di atas kapal lautan "Lady Jane", sementara pelabuhan pemunggahan adalah Benghazi. Bil lading langsung tidak menyebut tentang pelabuhan Singapura atau bahawa kapal penghubung "Seng Leong" adalah berasal dari Port Klang. Ruang "pra-angkut oleh" pada dokumen telah dibiarkan kosong, sekaligus memberi gambaran bahawa tidak ada sebarang transhipment dari Malaysia ke Libya.

Peralatan dibawa dari Port Klang ke Singapura oleh kapal penghubung "Seng Leong". Di Singapura, ia disimpan di gudang sementara menunggu untuk diambil oleh kapal induk "Lady Jane". Masaalah tercetus dengan pihak berkuasa Singapura di mana peralatan diarahkan supaya dialih dari situ. Pihak ketiga memohon arahan plaintif untuk membawa peralatan kembali dari Singapura ke Port Klang. Plaintif, bagaimanapun, menjawab bahawa ia tidak lagi mempunyai kepentingan terhadap peralatan. Peralatan akhirnya sampai ke destinasinya di Benghazi. Plaintif tidak mendapat sebarang manfaat dari SK defendan di atas baki jumlah kontrak. Plaintif, dengan itu, memulakan tindakan di sini terhadap defendan. Dan, terhadap pihak ketiga, plaintif memohon indemniti.

Yang arif hakim Mahkamah Tinggi menolak tuntutan terhadap kedua-dua defendan dan pihak ketiga. Plaintif merayu dan berhujah bahawa yang arif hakim telah khilaf kerana tidak membuat dapatan berhubung sama ada kedua-dua plaintif dan defendan sama-sama tahu tentang transhipment dan menerimanya, dan kerana itu, sama ada defendan diestop dari membuat bantahan terhadapnya. Dihujahkan seterusnya bahawa defendan telah menandatangani sijil berasal dan dokumen-dokumen lain yang menunjukkan pelabuhan lading atau tempat eksport adalah Singapura, yang menggambaran bahawa transhipment adalah perlu,

A sekaligus menunjukkan bahawa defendan mengetahui tentang transhipment. Dihujahkan lagi bahawa defendan menerima bil lading yang menunjukkan dengan jelas bahawa pelabuhan pemuatan adalah Port Klang dan defendan tidak membantahinya, malah telah bertindak di atasnya, mengemukakan bil lading kepada B JOWFE dan menerima bayaran sepenuhnya.

Diputuskan (menolak rayuan dengan kos kepada kedua-dua responden)
Oleh Abdul Kadir Sulaiman HMR:

C **[1]** Sudah menjadi undang-undang yang diterima pakai bahawa Mahkamah Rayuan tidak boleh membuat konklusi sendiri atas fakta yang didapati yang berbeza dari konklusi yang dibuat oleh mahkamah pertama kecuali konklusi yang dicapai oleh mahkamah pertama tersebut sangat tidak munasabah sehingga D tiada tribunal munasabah akan mencapai keputusan sedemikian, yang mana ianya tidak berlaku di sini.

[2] Defendan seharusnya mengetahui bahawa kapal "Lady Jane" hanya singgah di Singapura sementara peralatan adalah di E Shah Alam. Bagi membawa peralatan ke Singapura untuk dipunggah ke "Lady Jane" untuk pelayaran ke Benghazi, suatu jalan penyelesaian harus dicari. Namun begitu, walau apapun caranya, defendan mesti memenuhi peraturan surat kredit yang dipersetujuinya dengan JOWFE yang melarang transhipment, F serta peruntukan serupa yang terkandung di dalam SK untuk manfaat plaintif. Plaintif memilih untuk menggunakan kapal penghubung "Seng Leong" bagi mengangkut peralatan di Port Klang dan memunggahnya di Singapura sementara menanti kapal "Lady Jane". Defendan tidak diberitahu tentang cara G penyelesaian ini. Oleh yang demikian, defendan tidak boleh dikatakan sebagai mengetahui tentang transhipment untuk menghalangnya dari membantah tuntutan plaintif.

[3] Plaintif memilih untuk mengangkut peralatan dari Port Klang H melalui kapal penghubung "Seng Leong" yang bermakna ia melakukan transhipment peralatan tersebut. Transhipment bermakna mengangkut kargo melalui sebuah kapal ke kapal eskport yang akan membawa barangan ke pelabuhan destinasi. Dengan menggunakan kapal penghubung, dan dalam I halkeadaan yang wujud, plaintif telah melanggar terma SK kerana melakukan transhipment peralatan yang hendak dihantar ke Libya.

[4] Menyimpan barangan di daratan untuk suatu ketika tidak mengubah fakta tentang transhipment barangan tersebut. Unsur transhipment wujud bilamana peralatan diangkut dari Port Klang oleh kapal penghubung "Seng Leong" ke Singapura untuk dipunggah ke atas kapal "Lady Jane" bagi membawa peralatan dari situ ke pelabuhan Benghazi, Libya.

[5] Bil lading yang dihantar kepada defendan oleh pihak ketiga atas arahan plaintif tidak menggambarkan keadaan yang sebenar. Atas permukaan dokumen, tidak nampak transhipment peralatan dari Malaysia ke Libya. Apapun, salahlaku-salahlaku yang dibuat tidak boleh kesemunya dipikulkan atas pihak ketiga yang hanya melaksanakan arahan plaintif.

Case(s) referred to:

Aglo-American Oil Co Ltd v. Port of London Authority [1914] 1 KB 14 ***(refd)***

Houlder Brothers & Co v. The Merchants Marine Insurance Company, Ltd [1886] 17 QBD 354 ***(refd)***

Pekan Nenas Industries Sdn Bhd v. Chang Chin Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

Legislation refrred to:

Port of London (Port Rates of Goods) Provisional Order Act 1910 [UK], s. 9

For the plaintiff - Rajendra Navaratnam (Sonia Abraham & Eileen Yeoh with him); M/s Azman, Davidson & Co

For the 1st respondent - Ramdas Tikamdas (Ernest Azad with him); M/s Ernest Azad & Asssoc

For the 2nd respondent - Bharti Seth; M/s Bharti Seth & Assoc

Reported by Amutha Suppayah

JUDGMENT

Abdul Kadir Sulaiman JCA:

[1] This is an appeal by the plaintiff against the decision of the learned judge in the High Court below given on 15 July 1999 dismissing its claim against both the respondents who were the defendant and the third party, respectively, and allowing the counterclaim of the defendant, AQ-Pacific Wide Sdn Bhd. The

A third party is a ship forwarder appointed by the plaintiff for purpose of shipping the subject matter of the contract between the plaintiff and the defendant from Malaysia to Libya. The written judgment of the learned judge is to be found at pp. 33 to 52 of the Record of Appeal. We completed hearing the B submissions of parties on the appeal on 30 July 2003 and accordingly reserved our decision on the matter. We now give our decision on the appeal with our grounds.

[2] Having considered the records and the submissions by the C counsel for the parties, both orally and in writing, we decide to dismiss the appeal with costs to both respondents and we, accordingly, affirm the decision of the learned judge. Herewith are our grounds for coming to that decision.

D **[3]** The learned judge has produced a well reasoned judgment and had in detail given the background facts leading to the suit initiated by the plaintiff against both the defendant and the third party. We need not repeat it here except to mention that initially, the defendant had a principal contract with a trade organization E in Libya, known as Jamahiriya National Oil Well Fluid and Equipment, (hereinafter referred to as "JOWFE"), to supply certain specified equipment manufactured in Malaysia. For the supply of the equipment to JOWFE, the defendant entered into a contract with the plaintiff for the manufacture and supply of the equipment F at the price of RM2,348,445, C&F from Malaysia port to Benghazi port in Libya with specific condition of no transshipment of the equipment on its way from Malaysia to Libya. The defendant paid 40% of the contract price to the plaintiff and in exchange for which the plaintiff furnished a bank guarantee. The G contract between the plaintiff and the defendant, however, did not go through as expected, as the plaintiff was not able to ship the equipment under the C&F arrangement until further notice. The defendant applied for specific performance of the contract. On 8 January 1993 the High Court granted the order sought.

H **[4]** Following the order of the court, the plaintiff and the defendant worked out a compromise with the plaintiff agreeing to ship the equipment in its then existing state of completion. For this purpose, they entered into what is called an amended contract on 11 January 1993. It is upon this amended contract I that the dispute again arose which results in the decision of the learned judge as earlier mentioned.

[5] The following are the terms of the amended contract between the plaintiff and the defendant:

(a) The defendant will accept the 8 vessels and 8 agitators in the present condition and state of completion.

(b) The plaintiff will arrange to pack as soon as possible under he defendant's supervision and prepare all relevant documentations for shipment on a C&F basis at the revised price of RM1,523,000. Shipping documentations is to satisfy the defendant's LC stipulations. (The defendant's LC stipulation is the one given by JOWFE in favour of the defendant in respect of the principal contract between the defendant and JOWFE prohibiting transhipment of the equipment)

(c) Free access shall be allowed to defendant's representatives to the plaintiff's premises through normal channels and the plaintiff shall provide all necessary assistance for inspection and verification.

(d) The defendant will advance payment of RM1,000,000 in exchange for a bank guarantee to be provided by the plaintiff by Saturday, 16 January 1993. The defendant shall call upon the guarantee in the event the plaintiff refuses to perform this amended agreement. The guarantee is to be valid for 90 days from the date of issue.

(e) Also by Saturday, 16 January 1993, the defendant will prepare LC for balance of payment amounting to RM523,000 payable 10 days after presentation of shipping documents or 90 days from 16 January 1993 whichever is earlier.

(f) The plaintiff to be released by way of full and final settlement from all contractual obligations, performance, guarantees and warranties in damages and costs beyond those agreed in this contract upon the plaintiff complying with the terms herein.

(g) In compliance with the LC stipulations prohibiting transhipment and if as a result of the prohibition shipping costs should exceed the amount provided in the plaintiff's contract of RM128,002 the defendant will reimburse the plaintiff the extra costs.

(h) The defendant may also nominate a suitable vessel within the agreed period.

(i) In the event the plaintiff draws down on the LC after 90 days, the plaintiff will deliver the vessels and agitators to a wharehouse nominated by the defendant in the Klang Valley. (This LC is the one given by the defendant in favour of the plaintiff pertaining to the amended contract mentioned in 5(e) above).

[6] Pursuant to the amended contract, the defendant on 18 January 1993 paid the plaintiff a sum of RM1,000,000 and in exchange for the advance sum paid, the plaintiff furnished to the defendant a performance bond issued by a bank to the defendant guaranteeing payment to the defendant in the event of default by the plaintiff. This is in compliance with item 5 (d) above.

[7] As to the LC upon the balance sum of RM523,000, it was provided by Hong Kong Bank which stipulates the same condition as the LC given by JOWFE to the defendant prohibiting transhipment of the equipment from Malaysia to Libya. This is to comply with item 5 (e) above. The shipment is to be from Shah Alam/Port Klang to Libya or beneficiary's godown, which subsequently, however, was amended to allow shipment from Singapore but still with the prohibition of transhipment of the cargo to Libya.

[8] Upon entering into the amended contract, the plaintiff went busy looking for shipping agent/s to have the equipment sent to Libya. Through the introduction of the defendant, the third party was on 20 January 1993 appointed by the plaintiff to be the ship forwarder for the export of the equipment. It was agreed by the defendant and JOWFE, to the knowledge of the plaintiff, that a ship "Lady Jane" was to be used to transport the equipment. However, this ship would stop only in Singapore and not at Port Klang, Malaysia. So as to comply with the stipulation contained in the LC of no transhipment, the forwarder put up two proposals to the plaintiff i.e that the equipment could either be carried on land to Singapore or be loaded at Port Klang by any other ship for a straight journey to Benghazi. The plaintiff disagreed to either of the proposals put up by the third party forwarder. The forwarder then informed the plaintiff of the

existence of a feeder vessel "Seng Leong" plying between Port Klang and Singapore to which the plaintiff agreed in order to transport the equipment from Malaysia to Libya.

[9] The following day, 21 January 1993, the plaintiff sent a fax to its head office in Singapore stating that there would be a feeder vessel "Seng Leong" for the shipment from Port Klang to Singapore and from there, shipment would be on the mother ship "Lady Jane" to Benghazi, scheduled for the first week of March 1993. By another letter of 28 January 1993, the plaintiff informed its Singapore head office that the equipment had been delivered to Port Klang and the feeder vessel "Seng Leong" was in Port Klang awaiting for a berth expected to be available on 29 January 1993 for the equipment to be loaded on to it for onward journey to Singapore to await "Lady Jane". These were done without the knowledge of the defendant.

[10] A customs form entitled "Declaration of Goods to be exported" dated 30 January 1993 prepared by the plaintiff's shipping officer confirms that the equipment were loaded on a feeder vessel "Seng Leong" from Port Klang. However, the bill of lading dated 2 February 1993 upon which the plaintiff relies for performance of the amended contract and to draw down on the LC for the balance sum of RM253,000 shows that the place of receipt and loading of the equipment was Port Klang on the ocean vessel "Lady Jane" and the port of discharge to be Benghazi. There was no mention made at all of Singapore port and the feeder vessel "Seng Leong" originating from Port Klang in the said bill of lading. The column for "precarriage by" was left blank. This creates an impression that there was no transhipment of the equipment from Malaysia to Libya.

[11] To cut the story short, the equipment went on the feeder vessel "Seng Leong" on its journey from Port Klang to Singapore. In Singapore, it was kept at a godown there waiting to be taken over by the mother ship "Lady Jane". Problem arose with the authority in Singapore and the equipment was asked to be removed from there. The third party requested from the plaintiff for instructions for the equipment to be brought back from Singapore to Port Klang. However, the plaintiff replied that it has no further interest in the equipment. In the end, the equipment never reached its destination, Benghazi. The plaintiff never got the benefit of the LC of the defendant in respect of the balance over the contract sum and at the same time there was a performance

bond executed by it in the sum of RM1,000,000 in favour of the defendant. Hence, the prayers of the plaintiff in the suit against the defendant and the third party.

[12] In his ground of judgment the learned judge made the following findings:

> In the instant case it would appear the Defendant has absolutely lost the right to reject the equipment simply because the equipment was never shipped on board the ship named in the bill of lading nor shipped on any ship bound for the destination named in the bill of lading. The contract between the Plaintiff and the Defendant was a C&F contract. The equipment was never loaded on board the "Lady Jane" or any other ship bound for Benghazi, Libya. Due to this the ownership of the equipment at all material times remains with the Plaintiff.

[13] Then further down in his judgment, the learned judge says:

> Despite the prohibition against transhipment the Plaintiff shipped the equipment on board the "Seng Leong" out of Port Klang on 2.2.1993 for reloading on another vessel "Lady Jane". It was a fact that the equipment was never loaded on the "Lady Jane". In the result the equipment was stranded in Singapore. The Plaintiff had clearly not complied with the principal term of the contract regarding transhipment and therefore in breach of the agreement with the Defendant.
>
> It is also noted that the bill of lading dated 2.2.1993 upon which the Plaintiff relies for performance of the contract and to draw down on the letter of credit for the balance sum of RM523,000. shows that the equipment was shipped on board the "Lady Jane" at Port Klang enroute directly to Benghazi. This certainly is not the true situation. The Plaintiff admitted that this is not true in their letter to the Hongkong Bank dated 15.2.1993.

[14] The learned judge goes on to state on the finding of facts before him:

> The Plaintiff was aware from as early as 21.1.1993 i.e. one day after the Third Party was appointed as the forwarding agent, that the equipment was to be shipped on the ship "Seng Leong" from Port Klang to Singapore and then kept at the Pasir Panjang wharf before it is boarded on the "Lady Jane" from Singapore. This fact can be ascertained from the evidence of Plaintiff's witness Brian Nesbitt, who sent a fax to his superior Mr. Ball in Singapore informing of the arrival of the feeder vessel "Seng Leong" and

subsequent storage of the cargo in Singapore at Pasir Panjang. This proves that the Plaintiff knew of the transhipment. The Plaintiff also instructed the Third Party to notify the Defendants of the freight charges for Port Klang to Benghazi as the Defendant has agreed to pay the freight charges.

[15] As for the Third Party, on the facts, the learned judge says:

The Third Party discharged its obligations as the forwarding agent to the Plaintiff and accordingly the Third Party invoiced the Plaintiff for the services rendered. Third Party was paid in full *vide* Plaintiff's cheque dated 2.2.1993. The payment was for freight and forwarding agency.

...

Under the circumstances I hold the Third Party is not liable to the Plaintiff as Third Party had carried out their duties on the instructions given by the Plaintiff and the Plaintiff was fully aware of what was happening. The Plaintiff did not want to associate themselves with the export of this equipment for the reason that such export has attracted the attention of government authorities in London and Singapore in light of then existing embargo against Libya. This is probably the reason why the Plaintiff did not want to be named as the shipper or exporter in the bill of lading. As far as the Third Party is concerned it merely took instructions from the Plaintiff, discharged its duties and get paid for its services.

[16] As mentioned earlier, pursuant to the amended contract, the defendant paid an advance of RM1,000,000 towards the contract price and in return the plaintiff issued a performance bond. However, on 13 March 1993 the plaintiff obtained an interlocutory injunction prohibiting the defendant from drawing down on the performance bond. In the suit before the learned judge, the defendant sought an order that the interlocutory injunction granted in favour of the plaintiff be set aside to allow the defendant to draw down on it to claim the RM1,000,000. The defendant also claims damages in the sum of RM2,436,806 and interest. In his judgment, the learned judge decided in favour of the defendant and this is what he said:

A On the Defendant's counterclaim:

(a) a sum of RM1,000,000.00 to be drawn down by the Defendant. The interlocutory injunction dated 13.3.1998 obtained by the Plaintiff is set aside to enable the Defendant to draw down the said sum;

B

(b) the Court is unable to make any award of damages since there was no evidence of damages suffered by the Defendant has been adduced;

C (c) interest at 8% p.a. on the sum of RM1,000,000.00 from date of judgment until full settlement;

(d) Costs of the action.

[17] The learned counsel for the plaintiff, who is the appellant D before us, submitted that the bulk of the facts is undisputed and the appeal hinges on the finding of facts by the learned judge. If that be the case, it is settled law that this court could not be persuaded to come to its own conclusion on those facts found which is different from the conclusion reached by the court of first E instance unless the conclusion reached by the court of first instance is so unreasonable that no reasonable tribunal would have come to that conclusion, which we do not find it occurring here. To this, we have the support of the Federal Court decision in *Pekan Nenas Industries Sdn. Bhd. v. Chang Chin Chuen & Ors.* [1998] 1 CLJ 793 where at p. 825 Edgar Joseph Jr FCJ said: F

> In considering this appeal, we think it is right to say, at the risk of being trite, that like the Privy Council, we adhere to the principle that a trial Court is in a more advantageous position to make findings of fact and assessing the credibility of witnesses so G that we will not interfere with a decision which is based on such findings of fact unless there is a clear justification for doing so. (See *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212). However like the Privy Council, we will more readily interfere with the trial judge's inferences based on his findings as we would be in an equally good position as the trial Judge to make the determination. H (See *Tay Kheng Hong v. Heap Moh Steamship Co. Ltd.* [1964] MLJ 87, at p. 94, citing with approval *Benmax v. Austin Motors Co Ltd* [1955] AC 370, and followed recently by this Court in *China Airlines Ltd. v. Maltran Air Corp. Sdn. Bhd.* [1996] 2 MLJ 517).

I **[18]** Recently, this court on a similar matter in Civil Appeal No. W-02-530-00, (unreported) a medical negligence case, through Gopal Sri Ram JCA has this to say:

4. Cases of medical negligence are, in the main, facts sensitive. And in a case of this sort where everything turns upon the credibility of witnesses about what was said or not said or done or not done, the view formed by the primary trier of fact is entitled to great weight and we as a court of appeal are not entitled to differ save in an exceptional case. And this is not an exceptional case.

5. In our judgment the present case is amply covered by what Lord Robson said when delivering the Advice of the Board of the Privy Council in *Khoo Sit Hoh v. Lim Thean Tong* [1912] AC 323:

> The case was tried before the judge alone; it turned entirely on questions of fact, and there was plain perjury on one side or the other. Their Lordships' board are therefore called upon, as were also the Court of Appeal, to express an opinion on the credibility of conflicting witnesses whom they have not seen, heard, or questioned. In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the learned trial judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position and character in a way not open to the courts who deal with later stages of the case.

[19] However, in an attempt to bring the matter outside the principle mentioned earlier, the learned counsel cited various case authorities which would allow the appellate court to review the decision of the trial judge, involving question of facts. He submits that the learned judge has erred in not making a finding of whether both the defendant and the plaintiff knew about the transhipment and acquiesced to the same, notwithstanding the terms of the amended contract and consequently whether the defendant is estopped from objecting to the same. Looking at the evidence presented before the learned judge, we see no merits in the submission. It cannot be disputed that the defendant must have known that the "Lady Jane" only called at Singapore whilst the equipment was at Shah Alam. To get the equipment down to Singapore to be loaded on to "Lady Jane" enroute to Benghazi, a way has to be found. But as far as the defendant is concerned in whatever way it is done, it must satisfy the letter of credit arrangement it had with the party in Libya, ie, JOWFE which prohibits transhipment and a similar provisions contained in the LC in favour of the plaintiff. Mindful of this, the third party who was

introduced by the defendant to the plaintiff and who was acting for the plaintiff, had properly advised the plaintiff that the equipment should be taken by road from Shah Alam to Singapore or else to get a vessel plying between Port Klang and Benghazi. But the plaintiff disagreed to the proposal so put but would prefer to use the feeder vessel "Seng Leong" to take the equipment at Port Klang and discharge it in Singapore to wait for "Lady Jane". The defendant was not informed of this other alternative arrangement. In the circumstances, the defendant cannot be clothed with the knowledge of the transhipment to stop it from objecting the claim of the plaintiff. It was also submitted that the defendant signed the certificate of origin and other documents on 20th January 1993 bearing the port of loading or place of export as Singapore thereby giving an inference that transhipment was necessay, thereby imputing knowledge of transhipment upon the defendant. This again in our view, is devoid of any merit because as far as the defendant is concerned the ocean journey is to start from Singapore enroute to Benghazi and not from any other port of origin. The idea of a transhipment is that of the plaintiff who rejected the proposal put forward by the Third Party to be in compliance with the term of the LC of the defendant with JOWFE. The plaintiff whilst having no objection of the carriage by the "Lady Jane" from Singapore chose to take the equipment from Port Klang by a feeder vessel "Seng Leong" which amounts to transhipment of the equipment.

[20] In *Houlder Brothers & Co. v. The Merchants Marine Insurance Company, Limited* [1886] 17 QBD 354, transhipment is taken to mean goods transferred from ship to ship although there may be a break in the journey in the interim. In that case, it would appear from the headnote that it was an action brought on a policy of marine insurance subscribed by the defendants on rails shipped on board the steamship Kirkstall 'at and from Hull to London, including all risk of craft, until the goods are discharged and safely landed.' On the facts, it appeared that the rails arrived in London, and were discharged into lighters with the intention not of landing them, but of loading them into other ships for exportation to Sydney. Before they were so loaded a gale sunk some of the lighters. It was held that a policy of insurance on goods which includes 'all risk of craft until the goods are discharged and safely landed' does not cover the risk to the goods while waiting on

lighters at the port of delivery for transhipment into an export vessel. In his judgment in the Court of Appeal, Bowen LJ at p. 355 said:

> The policy in question includes all risk of craft until the said goods or merchandise be discharged and 'safely landed.' The risk insured against is the risk of the transit upon the lighters which have in the ordinary course of business to convey the goods to the shore. The nature of this risk can be perfectly appreciated and estimated by the parties to the contract. Landing goods means putting them upon the land, or upon that which by custom of the port is its equivalent. In the present case, instead of placing the goods on lighters to carry them to the shore, the goods were placed upon lighters which were to take them to an export vessel and there to load them as soon as she was ready to receive them. Such transhipment, however usual in the trade, is not the same thing as landing the goods directly and immediately upon the quay. A Lighter which has to land its cargo has only to make for the quay and to wait its turn in accordance with the usages of the port. A lighter which is intended to tranship the goods to another ship may have to wait for its arrival and till it is ready to take the cargo, and may thus be subject to additional risks of exposure to the weather and of collision with other vessels or barges in the dock. ... Cargo discharged upon lighters for transhipment to an export vessel is accordingly exposed to a peril which is not the same as that which it encounters if discharged upon lighters to take it to the shore at once. ... Nobody, in commercial or business language, can say that goods which are placed in lighters for transhipment are placed in lighters to be landed. ... But this falls short of proving that by any custom transhipment is equivalent to landing.

[21] This case cited explains the meaning of transhipment, to mean the transporting of cargo by means of a vessel to an export vessel which is to take the goods to its port of destination. Coming back to our case, the equipment under contract were originally to be transported from Port Klang to Libya or beneficiary godown as so provided by Hong Kong Bank in the LC, the same condition stipulated in the LC given by JOWFE to the defendant prohibiting transhipment. Subsequently, by agreement the contract was amended to allow shipment from Singapore instead of Port Klang but still with the prohibition of transhipment of the cargo to Libya. Instead of taking the advice of the forwarder to either take the equipment by land to Singapore or be loaded at Port Klang by any other ship than "Lady Jane" for a straight journey

A to Benghazi in Libya, the plaintiff chose to use a feeder vessel "Seng Leong" to transport the equipment from Port Klang to Singapore before being loaded on to "Lady Jane" in Singapore to carry the equipment from there to Benghazi. By using the feeder vessel, in the circumstances of the case, the plaintiff went against B the term of the LC by means of a transhipment of the equipment destined for Libya.

[22] Another case in point is *Anglo-American Oil Company, Limited v. Port of London Authority* [1914] 1 KB 14, which is more direct C on the point of transhipment which may include storage pending the arrival of another ship. Hence, storage on land for a period does not necessarily alter a transhipment journey of goods. In this case, the dispute between the plaintiffs and the defendant is over port rates. The plaintiffs claimed for exemption from port rates but D the defendant said otherwise. By s. 9 of the schedule to the Port of London (Port Rates of Goods) Provisional Order Act 1910, goods imported for transhipment only are exempt from port rates, and it is provided that "for the purposes of this section the expression 'goods imported for transshipment only' shall mean E goods imported from beyond the seas or coastwise for the purpose of being conveyed by sea only to any other port whether beyond the seas or coastwise which are certified and proved … (1) to have been intended for transshipment at or before the time of the report of the ship at the Custom House or within seventy- F two hours thereafter … and (2) to have been shipped again as soon as practicable within the limits of the Port of London for conveyance by sea to such other port."

[23] According to the case headnote, the plaintiffs received in the G Port of London from beyond the seas a large quantity of oil in bulk by their ocean tank steamer Narragansett. When that steamer was reported at the Custom House the plaintiffs intended to tranship to various ports in the United Kingdom specific quantities of the oil she brought, and they accordingly delivered to the H defendants inwards port rates exemption certificate under s. 9 of the Port of London (Port Rates on Goods) Provisional Order Act 1910, showing the quantity in tons they intended to tranship to each port. The oil from the Narragansett was discharged into the plaintiff's tanks at Purfleet, some of which were empty at the time, I and some contained oil intended for distribution in the London district and also oil discharged from previous steamers. From these

tanks the plaintiffs subsequently loaded the various quantities of oil mentioned in the inwards port rates exemption certificates, and conveyed them by small tanks steamers to the ports mentioned in the certificates. The plaintiffs then delivered to the defendants outward port rates exemption certificate for the oil so transhipped, and claimed exemption from the payment of port rates in respect thereof. The defendants refused to admit the plaintiffs' claim for exemption on the ground, *inter alia*, that as the oil brought by the Narragansett had been mixed in the tanks with other oil not intended for transhipment, the identity of the oil transhipped with that imported could not be certified and proved so as to comply with s. 9 of the Act. But it was held by the court that the oil transhipped had been sufficiently identified with that certified for transhipment, and therefore that the plaintiffs were entitled to the exemption claimed. So, the transshipment here involved the transfer of the oil brought by the Narragansett to the Port of London from a place beyond the seas to various ports in the United Kingdom in specific quantities by other small tank steamers. Just as in our case, the element of transhipment is involved when the equipment was transported from Port Klang by a feeder vessel "Seng Leong" to Singapore to be loaded onto the ship "Lady Jane" to carry the equipment from there to the Port of Benghazi, Libya. This surely is contrary to the stipulation in the LC provided by Hong Kong Bank prohibiting the transhipment of the equipment from Malaysia to Libya *via* Singapore.

[24] It was further argued that the defendant received the bill of lading on 2 February 1993 which clearly states on its face that the port of loading is Port Klang and the defendant did not object to it but acted on it and submitted the bill of lading to JOWFE and got paid in full. The simple answer to that is that there was no evidence that suggest collusion between the plaintiff and the defendant that there was to be a transhipment of the equipment from Malaysia to Libya. It was an act done by the plaintiff against the advice of the third party which is not within the knowledge of the defendant. As far as the defendant is concerned, there should not be any transhipment. The bill of lading on its face does not suggest any transhipment. It was from Port Klang in Malaysia to Benghazi in Libya. If at all there is to be any dissatisfaction on the part of the defendant is that the ocean journey did not commence from Singapore as expected. However, the subsequent amendment to the port of loading of the

equipment allows it to be either through a Malaysian port or Singapore port. Therefore, in as far as the defendant's LC with JOWFE is concerned there was compliance to entitle the defendant to be so paid which was the condition expressed in the term of the amended contract between the plaintiff and the defendant. The falsity, if at all, as to the description in the bill of lading was not created by the defendant. The cause of the transhipment was created by the plaintiff who disagreed with the view of the third party that since "Lady Jane" operates from Singapore, the equipment should be carried by road to Singapore to be loaded onto "Lady Jane" for the journey to Benghazi, Libya. So, on the fact, we find that the learned judge did not err in the making of his decision in the case dismissing the action of the plaintiff against the defendant and allowing the counterclaim of the defendant.

[25] We now come to deal with the action of the plaintiff against the third party which the learned judge also dismissed. Against the third party, the plaintiff sought:

(a) declaration that the plaintiff is entitled to be indemnified by the third party;

(b) judgment for any amount due from the plaintiff to the defendant; and

(c) judgment for any costs paid by plaintiff to the defendant and plaintiff's costs for the proceeding against third party.

[26] As earlier noted, the third party acted for the plaintiff upon introduction by the defendant as a forwarding agent. The third party must be aware of the non transhipment provisions of the equipment to be sent from Malaysia to Libya. "Lady Jane", the ship to be used for the transport of the equipment was to be at Singapore port but the equipment was in the godown at Shah Alam and Port Klang is the nearest port in Malaysia and "Lady Jane" was not to be at Port Klang. So, on the appointment, the third party representative proposed to the plaintiff that the equipment must be taken by road to Singapore to be loaded on to "Lady Jane". The reason for the proposal must have been to be in compliance with the two LCs. But the plaintiff disagreed on the proposal. So, what is the choice left so as to get the equipment to be in Singapore to commence its journey on "Lady Jane" to Libya? The idea of a feeder vessel "Seng Leong" to carry

the equipment from Port Klang to Singapore then cropped up which the plaintiff willingly agreed. The plaintiff who was well aware of the non transhipment provisions was ready for the risk. It is not the third party that insisted that a feeder vessel be used instead in defiance of the non transhipment provisions. It was the alternative left for the equipment to be in Singapore as the plaintiff had refused the proposal for the journey to commence by road to Singapore. The plaintiff was aware at all material times of the mode of shipment. The bill of lading prepared and dated 2 February 1993 which was sent to the defendant by the third party at the instruction of the plaintiff did not represent the true state of affairs. It named Port Klang as the port of loading by "Lady Jane", knowing fully well that "Lady Jane" would not be calling at Port Klang. The document also named the port of discharge and place of delivery being Benghazi in Libya. There was no mention at all made of the feeder vessel, "Seng Leong" and the column "precarriage by" was left blank. Thus, on the face of the document there appear to be no transhipment of the equipment from Malaysia to Libya. But all the misdeeds cannot be attributed to the third party who merely carried out the instruction from the plaintiff.

[27] But the leaned counsel for the appellant before us submitted that the third party knew or must have known as an experienced freight forwarder, that the arrangement made would involve transhipment of the equipment and would jeopardise the payment under the LC. Yet the third party did not warn the plaintiff of the danger or advise the plaintiff as to what steps it could take to regularise the transaction, to ensure that the bill of lading complied with all respects with the LC. We see no merit in the line of submission on the basis of what has been said earlier. We, therefore, find no error committed by the learned judge in arriving at the finding of non liability of the third party.

[28] In the upshot, for the reasons given, the appeal by the plaintiff against the defendant and the third party is dismissed with costs to both the respondents. The deposit is to account of taxed costs. The decision of the learned judge is affirmed.

[29] My learned brothers, Richard Malanjum and Arifin bin Zakaria, JCAs has read the draft and had given their agreement thereto.